The Solicitors' Journal

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CURRENT TOPICS

The Law Society and Legal Education: 1939-1945

In a survey of legal education during the war, 1939 to 1945, the *Journal of the Society of Public Teachers of Law* for 1947 has assembled contributions on the subject from the pens of responsible teachers in all the universities and organisations in this country concerned with the teaching of law. "H.F.J.," writing about the work of The Law Society, states that when classes were resumed after their temporary closing during the autumn term of 1939 there were 158 oral students (final and intermediate) and the same number in the summer. Owing to bombing in the autumn, classes were discontinued except for a few students in a special category, and new entrants were not accepted. In the spring and summer terms, 1941, 62 students, all in their intermediate stage, attended, and in the autumn their number decreased to 35. Thereafter, classes continued with about 40 to 60 students until the end of hostilities. At one period, the writer states, classes had to be held for the sake of safety in a single stuffy basement room. It was, however, during the war that the new system of academic education for articled clerks was worked out, substituting periods of continuous study in place of the "compulsory year" during which attendance at lectures was usually concurrent with work at the office. The article contains a full statement on the refresher courses and the "Modern Law Manual for Practitioners," by Mr. R. E. Megarry, who was appointed director of the refresher courses in December, 1944. Frequent reference has been made to these courses and tribute to those responsible for them has often been paid in these columns. "H.F.J." is of the opinion that "it may possibly become a permanent feature."

A Solicitor's Duty

Judge Scobell Armstrong, the Divorce Commissioner sitting at Falmouth, on 24th December, commented on an undefended divorce case in which a firm of solicitors were stated to have acted first for the wife and later for the husband. After hearing evidence from a partner in the firm, the Commissioner said that he considered his account of what took place to be both honourable and lucid. At the same time, however, he emphasised that a highly confidential relationship existed between solicitor and client in which the solicitor was bound to learn from his client facts which might unconsciously assist him in the work which he undertook at a later stage in the services of the other party. From that fact had sprung up a rule of professional conduct, and according to the rule solicitors should always refrain, where they had advised one party in proceedings, from subsequently advising the other party. The Commissioner added that it was a rule which should be most strictly observed in the interests of the profession and in order to maintain the absolutely confidential character of the relations between clients and their solicitors. It was a thing which in a busy office might sometimes occur through no fault whatever. In this case it had occurred because the solicitor knew, and quite rightly knew, that, having looked at the files, he had no knowledge that could assist the petitioner. The rule is strict, however, and in the learned judge's view it must be observed without exception.

Calligraphy and the Law

"Once upon a time" there were no typewriters. This, as some solicitors can remember, is the beginning of a true story of the degeneration of the art of handwriting. There were in those pre-typewriter days many junior clerks who could "copy all the letters in a big round hand," and many conveyancers who could produce a beautiful script which it is still a joy to behold. Alas, except for a few sentimentalists who practise the art for its own sake, the potential scriveners have, it must be assumed, found other outlets for their craftsmanship, for the ubiquitous, though expensive, typewriter and the now elusive typist have taken their place. In the current issue of the *Secretary*, Mr. Alfred Read, F.C.I.S., of the Powell Duffryn Company, past president of the Chartered Institute of Secretaries, while deploring the increase in illegibility in copied documents, seems to suggest that handwritten legal documents are more common than may be imagined, although not all of them may emanate from solicitors' offices. He suggests that the stock exchanges should request their members, wherever possible, to have transfer deeds typewritten in place of manuscript, and company secretaries should insist on strict adherence to proper share registration practice. There is, however, a complaint about lawyers' handwriting, albeit transatlantic, in the October, 1947, issue of the *Massachusetts Law Quarterly*, where a writer states that the signatures of many members of the Bar are "atrociously illegible." "Perhaps it would be worth while," the writer concludes, "to establish a refresher course in handwriting, or at least, signatures which have seriously deteriorated since the advent of the typewriter."

The Boundary Commission

It became quite clear when the first proposals of the Boundary Commission were published last May that many of the familiar, and even historic, boundaries of local

government were about to disappear in the near future. Arguments of some sort between local authorities affected seem inevitable, and it is important to restrict their number. Mr. NEVILLE HOBSON, chairman of the Rural District Councils Association, made a reasoned appeal in a letter to *The Times* of 13th January for the maximum of understanding and goodwill now that the second report of the Commission will soon be published. While recognising the effectiveness of the majority of non-county boroughs and urban and rural district councils, Mr. Hobson wrote: "The propriety of certain types of limited fusion and balanced adjustment of boundaries has been increasingly recognised." He suggested that the time had come when the relevant associations might reasonably discuss the issues. Nothing could be more desirable than that on issues which affect the daily life of every citizen, the associations of local authorities, which, after all, do not exist for selfish purposes, should seek to discover some way in which they can join to serve the common good. There can, as Mr. Hobson wrote, be merit in a dignified agreement to differ. If a conciliatory spirit is shown, as LORD SIMON OF WYTHENSHAWE wrote in *The Times* of 15th January, in a letter supporting Mr. Hobson's plea, "then the British local government system may again become a model for the world."

"For the Defence"

IN a "Current Topic" last year (91 SOL. J. 474) we had occasion to refer to the methods of a leading trial lawyer of the New York Bar, Mr. STRYKER, as providing good lessons for English advocates. A new lesson for advocates has now been written by Mr. Stryker himself in the form of a biography of one who has been described as "unquestionably the greatest advocate who ever appeared at the English Bar." Such a lesson, by means of such an example and by such a teacher, will undoubtedly be good reading for English lawyers. At present all that has reached these shores, so far as we know, is a review of the book (Stryker's "For the Defence," Doubleday and Co., Inc.), which appears in the *Massachusetts Law Quarterly* for October, 1947. The reviewer pointed out that Erskine was the only lawyer who, in the opinion of competent historians like Sir William Holdsworth and Mr. G. M. Trevelyan, practically prevented civil war in England by his arguments to a jury which resulted in the acquittal of Hardy, Horn-Took and Thelwall in the cases of treason instituted by the Government of the younger Pitt, "at a time of hysterical apprehensions of French revolutionary ideas." The reviewer concludes: "It is unfortunate that Mr. Stryker chose for his title the phrase 'For the Defence,' which was the title of the Life of Marshall Hall published a few years ago. Erskine was a far more important figure than Marshall Hall."

The Children Bill

THE text of the Children Bill, which was formally introduced in the House of Lords before Christmas, has now been published. It contains proposals in implementation of the main recommendations of the Curtis and Clyde Committees as to the welfare of derelict children, and it is estimated that it will affect some 125,000 children in England and Wales and 13,500 in Scotland. The main obligations under the Bill are to be placed on counties and county boroughs. They are to provide children's committees, children's officers and children's homes and they are to receive into their care any child in their area under the age of seventeen who has no parent or guardian, or has been abandoned or lost, or whose parents or guardians are prevented by incapacity or any other circumstances from providing for his proper accommodation, maintenance and upbringing. Most interesting from the legal point of view are the proposals in cl. 2 of the Bill with regard to the new power to be given to local authorities to assume parental rights over a child in their area, if under seventeen, where he has neither parent nor guardian, or has been abandoned by his parents or guardians, or is lost, or his parent suffers from some permanent disability rendering him incapable of caring for the child, or is of such habits or mode of life as to be unfit to have the care of the child. If a parent's whereabouts are known the local authority must serve him with written notice of their resolution assuming parental rights, and he will have a right to serve written notice of objection within a month. On the expiry of fourteen days after such service the resolution is to lapse, unless within that time the authority complain to a juvenile court and the court orders that it is not to lapse. The resolution is to remain effective until the child is eighteen, subject to the right of the parent or guardian at any time to apply to the court to set aside the resolution. The court will then have power to set it aside, if it is for the child's benefit to do so, or to allow the child to be under the control of a guardian or parent for a specified period. This, together with the provisions in cl. 14 as to boarding out, should go some way towards achieving the ideal underlying the original recommendations, that the "natural home" is the pattern on which care and protection should be modelled.

Fusion in India

THE high standard set by No. 1 of the *Indian Law Review* has been maintained in numbers 2 and 3, which have recently reached us. They are historic numbers, for No. 2 records the assumption of sovereign power by the Dominion of India on 15th August, 1947, and both numbers contain articles on the results of this momentous event so far as the Indian legal system is concerned, as well as the full text of the transitional constitutions of India and Pakistan. Most interesting for English readers is a note on "the dual system," or, as we might call it, the problem of fusion. In Bombay solicitors and barristers form two separate professions and the Congress Ministry in office in the province is pledged to abolish this state of affairs. The Bar, according to the note, is "putting up a strenuous struggle for its very existence." The writer, Mr. J. R. VIMADALAI, expresses a strong opinion in favour of fusion. The sole test by which the question is to be judged, he rightly states, is the interests of the public, and if it is true that two heads are better than one, and that the result of the dual system is that there is a weeding out of bad points with a saving of time and cost to the litigant, the fact remains that two persons have to be paid, and the question still remains whether the increased efficiency justifies the increased cost. Two of his arguments will give much food for thought to lawyers in this country. "In a poor country like India," he writes, "we might well prefer to have justice cheap so as to make it available to all of us. Moreover, the dual system prevails only in London, Bombay and Calcutta, and it could not be suggested that in the rest of the world justice is inefficiently administered."

Recent Decisions

In *Joseph* v. *The King*, the Judicial Committee of the Privy Council (LORD UTHWATT, LORD OAKSEY and Sir JOHN BEAUMONT), on 12th January (p. 53 of this issue), allowed an appeal against a conviction by the Supreme Court of Fiji for manslaughter, on the ground that the appellant had been convicted by assessors who had no power to try or convict him and sentenced by a judge who had not convicted him. Under s. 308 of the Criminal Procedure Code in force in Fiji the Chief Justice was to have recorded the opinion of the assessors with whom he sat and then to have delivered judgment himself, but he had in fact accepted the conclusion of the assessors as the verdict of a jury which bound him instead of regarding it merely as an opinion which might help him in arriving at a conclusion.

In an appeal, on 13th January (*The Times*, 14th January), from the decision of a pensions appeal tribunal, DENNING, J., held that a person who had suffered a "war injury" within the meaning of the Royal Warrant was entitled to an award of entitlement to a pension, and the fact that he was suffering from no disability as the result of the injury at the time he made his claim to a pension did not disentitle him, but only resulted in there having to be a nil assessment at the present time.

THE COMMON LAW IN 1947

An attempt was made in our issue of 19th July, 1947 (91 Sol. J. 390), to summarise some of the developments in common law matters during the first half of 1947. The second half of the year, whilst it brought forth no successor to *Christie* v. *Leachinsky* [1947] A.C. 573, and *Searle* v. *Wallbank* [1947] A.C. 341, certainly saw no falling-off in the importance of the familiar principles which derive from the ancient common law or in the extent to which they furnished the judges with the solutions of the problems which came before them. At the same time, as we are reminded by the following passage from the judgment of Denning, J., in *Nelson and Others* v. *Larholt* [1947] 2 All E.R. 751, those principles have long ceased to form by themselves a self-sufficient code for the guidance of any modern court. "This principle," says his lordship, referring to the right of the true owner of the proceeds of a cheque to recover the amount of it from anyone who takes the cheque with notice of a want of authority in the drawing of it, "has been evolved by the courts of law and equity side by side . . . It is no longer appropriate, however, to draw a distinction between law and equity. Principles have now to be stated in the light of their combined effect. Nor is it necessary to canvass the niceties of the old forms of action. Remedies now depend on the substance of the right, not on whether they can be fitted into a particular framework. The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the court orders restitution if the justice of the case so requires."

"Remedies now depend on the substance of the right." Thus the first inquiry embarked on by the Court of Appeal in *Cutler* v. *Wandsworth Stadium, Ltd.* (1948), 92 Sol. J. 40, was whether, upon the true construction of a statute, the Betting and Lotteries Act, 1934, a bookmaker who has suffered damage as a consequence of a breach of the obligation imposed by s. 11 (2) of the Act upon the occupier of a licensed track has a right to sue the occupier in respect of that breach. Having decided that the Act conferred no such individual right of action, the court was bound to discharge the injunction which Oliver, J., in the court below, taking a different view of the statute, had granted. There being no substantive right, no remedy was possible whatever might be the merits of the plaintiff's complaint on the facts.

Principles have, indeed, to be stated in the light of the combined effect, not only of law and equity, but also of supervening statutes. The Crown Proceedings Act, 1947, is now current law and, along with the ancient doctrines which it abrogated, there seems likely to be cast out shortly that little-loved monument to nineteenth century smugness, common employment, for the Law Reform (Personal Injuries) Bill has passed its third reading in the House of Lords. That august assembly itself, in its capacity as part of the Legislature, finds its power threatened, and some indications would seem to suggest that the near future may see the supreme law-making authority actually exercised by the King on the sole advice of his faithful Commons.

The doctrine of judicial precedent on which so much of the common law has been built and which is such a distinguishing feature of the law of English-speaking countries has also received further clarification during recent months. It will be recalled that in *Young* v. *Bristol Aeroplane Co., Ltd.* [1944] K.B. 718, a full Court of Appeal held itself bound by its own previous decisions, with some exceptions, whether those decisions were decisions of the full court or of a division of the court. It has now been made clear that, on similar principles, a Divisional Court of the High Court is bound to follow a previous decision given by it in a matter in which it is the final court of appeal, as, for instance, in matters arising under the Police Pensions Act, 1921 (*Huddersfield Police Authority* v. *Watson* [1947] K.B. 842). Pointing out that *Young's* case did not differentiate between Court of Appeal judgments which were final and those which were subject to review by the House of Lords, Lord Goddard, C.J., exclaimed: "How much more important is it that this court, which is a final court in this matter, should follow its own decisions and give full force and effect to them . . . In my opinion, if one thing is certain, it is that *stare decisis* is part of the law of England." His lordship went on to distinguish certain *dicta* which suggested that a court was bound by decisions of a court of co-ordinate jurisdiction only if they were subject to appeal. These observations, he thought, referred to the position in the days when there were three High Courts all reviewable by the Exchequer Chamber. The High Court was now one court, and the decision under consideration was not a decision of a court of co-ordinate jurisdiction but of the Divisional Court itself. On the question of the treatment by a judge of first instance of the decision of a judge of equal rank, Lord Goddard had this valuable comment: "I can only say for myself that I think the modern practice is that a judge of first instance, although as a matter of judicial comity he would usually follow the decision of another judge of first instance unless he was convinced that that judgment was wrong, certainly is not bound to follow the decision of a judge of equal jurisdiction. A judge of first instance is only bound to follow the decisions of the Court of Appeal and the House of Lords and, it may be also, of the Divisional Court."

In *James* v. *Minister of Pensions* [1947] K.B. 867, Denning, J. (at p. 872), stated his opinion that *stare decisis* did not apply in its full rigour to a rapidly developing branch of the law such as that under the Pensions Appeal Tribunals Act, 1943, in which it was inevitable that there should occasionally be errors.

Young's case was also referred to in *Williams* v. *Glasbrook Bros.* [1947] 2 All E.R. 884. The Court of Appeal was there asked to entertain an argument to the effect that a previous decision of its own was inconsistent with and showed a misunderstanding by the court of a previous decision of the House of Lords. The Court of Appeal refused to admit such an argument, holding that the case did not come within the very limited class of case in which the court was entitled to reconsider a previous decision of its own. Cases of that class were said in *Young's* case to be three in number: (1) where two previous decisions of its own conflict; (2) where the previous decision, though not expressly overruled, cannot stand with a decision of the House of Lords (in view of *Williams* v. *Glasbrook* the qualification must be added that the House of Lords decision must be subsequent to the Court of Appeal decision the reconsideration of which is in question); (3) where the court is satisfied that its previous decision was given *per incuriam*, that is to say, in ignorance or forgetfulness of a case or a statute (*per* Lord Goddard, *loc. cit.*, and for an example, see *Moore* v. *Hewitt* [1947] K.B. 831).

These questions of precedent seem to the writer to be of special interest as a pendant to Professor Paton's and Mr. Sawer's learned article in the *Law Quarterly Review*, to which reference was made in a recent "Current Topic" (91 Sol. J. 683).

The periodicity of a given subject in the reports is an interesting, if sometimes unprofitable, study. For instance, it seems to be more than one hundred years since the law relating to the justification for the shooting of another's dog was considered by a superior court in a civil action for damages. *Cresswell* v. *Sirl* (1947), 91 Sol. J. 653, in which this topic arose, followed, strangely enough, hard on the heels of *Gott* v. *Measures* (1947), 91 Sol. J. 678, which concerned an information under the Malicious Damage Act, 1861, raising a similar question in a more familiar form. Since the last appearance of the point in a civil case what may be called a parent principle has evolved applying generally to the justification of acts of trespass on grounds of necessity (*Cope* v. *Sharpe* (*No. 2*) [1912] 1 K.B. 496). The fact that this wider principle was not available for the guidance of the court in earlier cases has led the Court of Appeal in *Cresswell* v. *Sirl* to restate the law applicable to the case "in the light of more modern authority," with the consoling approval of the late Sir Frederick Pollock and not without a sidelong glance at developments in America. The difference between the

original proposition and the Court of Appeal's new formulation necessitated criticism of a passage in "Halsbury" (2nd ed., vol. 1, p. 566, para. 973) as being too narrow, and the remission of the case to the county court judge. It would be hard to find a better example of the evolutionary processes of the common law.

J. F. J.

Divorce Law and Practice

VARYING SEPARATION AGREEMENTS

WHEN a husband and wife enter into a separation agreement with each other by which the husband undertakes to pay the wife a certain sum periodically, the question frequently arises as to what is to be the effect of the agreement if subsequently the marriage is dissolved. Of course, one must first look to the agreement to see what, if any, provisions are made in the agreement itself for what is to happen in the event of the parties to it becoming divorced at a later date. It may well happen, indeed it frequently does, that no such provision is made. What then? If, when the marriage is dissolved, the husband is the innocent party he may, not unnaturally, wish to be no longer bound to support a worthless woman who is not even his wife any longer, but can he always be certain that in these circumstances he will be freed from this liability after the divorce is over?

Under s. 192 of the Judicature Act, 1925, "the court may, after pronouncing a decree of divorce or nullity, inquire into the existence of any ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and the court may make such order, with reference to the application of the whole or any part of the property settled either for the benefit of the children of the marriage, or of the parties to the marriage, as it thinks fit," and further, the court may exercise these powers even if there are no children of the marriage. From this it is clear that so long as the agreement under which the husband was bound to pay can be construed as part of an ante- or post-nuptial settlement then the agreement may be investigated and varied if the court considers fit. It thus becomes material to discover what the courts have in the past considered to be "settlements" within the meaning of this section of the Act. The authorities on this point are legion, but the odd circumstance is that the simple agreement, in writing but not under seal, whereby the parties agree to separate and the husband agrees to pay the wife a certain periodical sum, has never, so far as the writer can discover, been the subject of a judicial decision. That such an agreement would probably be held to be a settlement within the meaning of the Act is borne out by the case of *Dormer* v. *Ward* [1901] P. 20, where it was held that a covenant by a husband to pay an annuity to his wife was a post-nuptial settlement within the meaning of the Act. This view is further confirmed by a long line of authorities, in all of which emphasis has been laid on the fact that the word "settlement" is to be interpreted in the broadest terms. Perhaps the point was most thoroughly discussed in *Melvill* v. *Melvill and Woodward* [1930] P. 159, where there is also an interesting discussion on the meaning of "post-nuptial." In that case a respondent wife, after her husband had filed a petition seeking dissolution of their marriage on the ground of her adultery, executed a settlement of interests to which she was entitled under a will and under the marriage settlement of her parents and settled them on herself, reserving a general power of appointment by will in default of any surviving children and further reserving a power of appointment in favour of any surviving husband. It was held that this settlement was a settlement within s. 192 of the Judicature Act, 1925, and that, despite the fact that the intention of the settlement was clearly shown by the surrounding circumstances to be to benefit the co-respondent in the case, whom she subsequently married, nevertheless it was a settlement "on the parties whose marriage is the subject of the decree" and was thus a post-nuptial settlement with regard to the first marriage. Referring to the principles upon which the court must proceed in deciding whether any particular set of facts constitutes a settlement, Lord Hanworth, M.R., said: "It is, to my mind, not possible, nor would it be wise, to attempt to give a precise definition of the settlements that come within the purview of this section. I think the court ought always to bear in mind . . . that the section is intended to be a wide one and embraces a large number of settlements which might not appear to be settlements in the strict terms of a conveyancer, because the section is intended to operate in a number of cases not easy to catalogue under any definition." The whole matter is put succinctly by Lord Penzance in *Worsley* v. *Worsley* (1869), L.R.1.P. & M. 648: "The substance of the matter is, that the Legislature by this section has armed the court with authority to make special arrangements in the case of a woman being found guilty of adultery, in reference to property settled upon her in her character as a wife."

Despite the fact, however, that the courts are liberal in their interpretation of the meaning of the word "settlement," this does not mean that they will consider that any settlement will come within the compass of the Act, and a number of cases go to show that there are various types of settlement, using the word now in its strict sense, which will not be deemed to be settlements under s. 192 of the Judicature Act, 1925. Such settlements were considered in *Loraine* v. *Loraine* [1912] P. 222, where it was decided that the court has not the power to affect the will or the terms of the will of the wife's father. In *Hargreaves* v. *Hargreaves* [1926] P. 42, a young man, aged twenty-one, settled property and reserved a power of appointment. He was married shortly after he had made the settlement, and he exercised the power of appointment by appointing a yearly sum of £500 to his wife for her life. It was claimed that the original settlement under which the power of appointment was created was a settlement within the meaning of s. 192; but it was held that this was not the case because it was not made in view specifically of the marriage, although the marriage might have been contemplated at that time. It will be noticed, of course, that both these settlements are pre-nuptial settlements, and it may be that the courts would interpret pre-nuptial settlements rather more strictly than post-nuptial settlements.

To return, then, to the original problem suggested at the commencement of this article, it would seem that an agreement, in writing but not under seal, such as is very common at the present time, whereby the husband and wife agree to separate and the husband agrees to pay a certain periodical sum to his wife, there being no *dum casta* clause and no provision in the agreement as to what is to happen in the event of a divorce, is probably a settlement within the meaning of s. 192 of the Judicature Act, 1925. If this is the case, then the court may alter the settlement as it sees fit and an innocent husband will usually be saved from the liability of supporting his erstwhile wife thereafter.

If this interpretation of the law is wrong and such an agreement is not a settlement, then one is led to ask the interesting, albeit somewhat academic, question—does the agreement become void on the divorce of the parties on the ground that the original agreement was based on the fundamental assumption by both parties that they were to remain married so that the agreement becomes "frustrated" as a result of the divorce? Space does not permit an investigation of this problem, even if it were profitable to pursue it.

How does the foregoing discussion affect the ordinary practitioner? The answer is simple—so long as there is even a slight element of doubt in this matter it is always wise when drawing up an agreement of this nature to consider the advisability of including a clause which explains what is to happen in the event of the marriage being subsequently dissolved.

P. W. M.

TOWN AND COUNTRY PLANNING ACT, 1947: RIPE LAND

A LETTER has been received from a correspondent which raises a point of substantial financial importance on one of the qualifications necessary to constitute land " ripe " for the purposes of the Town and Country Planning Act, 1947. The qualification concerned is that which requires either a building contract to have been made within ten years before the 7th January, 1947, and to be in force on the appointed day, or a byelaw submission or a building application to have been made within such ten years. No difficulty arises with regard to the building contract or byelaw submission, as it is clear that they must relate specifically to buildings as distinct from land, but it is with regard to the building application that the point arises.

In the case of building land it is common practice to submit to the interim development authority under the Town and Country Planning Acts, 1932 and 1943, as a first step, a lay-out plan of the land showing the lay-out of roads and plots and type of development, e.g., dwelling-houses or shops, and the ground outline of the houses may even be indicated to show whether they are detached or semi-detached, but no detailed plans of the buildings are submitted at this stage, these being left to form the subject of a later application or applications. Sometimes the initial application does not show even a lay-out but is really only a user application, i.e., it describes simply the area of land concerned and requests permission to use it, e.g., for residential development. This procedure saves trouble and expense in preparing building plans which might be wasted if the authority did not approve the use of the land for the particular purpose or did not approve the lay-out or density proposed. It is probably safe to say that a very large area of land is covered by such lay-out or user applications only without any applications for specific buildings having been made. It appears from our correspondent's letter that many solicitors, surveyors and others in his neighbourhood are treating the submissions of such lay-outs as building applications, and indeed, this is probably a widespread misconception. It is quite clear that such lay-outs do not constitute building applications.

In the first place it must be remembered that the whole of s. 80 of the 1947 Act is related to development " consisting of the erection, extension or alteration of buildings." In the second place the definition of " building application " given in the section must be studied. It is as follows: " the expression ' building application ' in relation to any development means an application including such plans as aforesaid and made by any such person as aforesaid to a local or other authority under the Town and Country Planning Acts, 1932 and 1943, or under any byelaws or other enactment requiring the consent of that authority to be obtained for the construction, extension or alteration of buildings." The important words are " including such plans as aforesaid." The plans referred to are those described in the immediately preceding definition of " byelaw submission " as " plans of the buildings proposed to be erected, extended or altered in the course of the development." Those who consider a lay-out plan satisfies the definition of building application must, it is thought, be reading the definition as meaning an application, including an application accompanied by building plans, made to a local or other authority under the Town and Country Planning Acts, etc., thus making any interim development application relating to the proposed development of the land for building purposes a sufficient compliance with the requirement. That this was not the intention of the Government is evident from the Committee stage of the Bill in the House of Lords, for there the opposition sought to introduce an amendment to have exactly this effect, and the Lord Chancellor, speaking against it, said: " Subsection (4) (*b*) " [now (3) (*c*)] " admits a planning application if it is a ' building application ' ; that is, one that includes plans of the buildings. We consider that nothing wider than that would be consistent with the conception of dead ripe land. A planning application, as opposed to a building application, is much wider and much more vague, and might be submitted long before land is even beginning to ripen."

The Act must, of course, be interpreted as it stands, but it is quite clear that it carries out the intentions of the Government, for the definition reads that building application *means* (not includes) an application including such plans as aforesaid ; if it were otherwise the word " and " immediately following would not make sense and the words " including such plans as aforesaid " would be redundant. To qualify as a building application, therefore, an interim development application or an application under the Restriction of Ribbon Development Act, 1935, must have included plans of the buildings proposed to be erected, extended or altered. An indication on a lay-out plan of the ground outline of buildings could not be said to be " plans of the buildings."

This very narrow definition is likely to cause disappointment to many owners, and only serves to indicate how very restricted the amount of ripe land for the purposes of the section really is and with what great care each case must be examined. If it is found that any particular land is not ripe land the owner should then be advised as to whether he is likely to obtain any relief on the ground that the land is " near ripe " (see 91 SOL. J. 200).

R. N. D. H.

Taxation

TAXATION IN LEGAL PRACTICE

II. ADMINISTRATION OF ESTATES

THE personal representatives of a deceased person stand for many income tax purposes in the shoes of the deceased. For instance, they are liable to make returns of his income from all sources to the time of his death, and to pay the tax thereon from the property under their control, and, as Macnaghten, J., pointed out in *Bryan* v. *Cassin* [1942] 2 All E.R. 262, they can assert any right to repayment of tax which the deceased possessed at the time of his death. But that case shows that there may be circumstances in which a relief or exemption to which the deceased would have been entitled had he survived is not available to the representatives. An executor had received under deduction of tax the final payment of an annuity ceasing on the death of the deceased, and accruing from day to day. Following the Scottish case of *Commissioners of Inland Revenue* v. *Hendersons Executors* (1931), 16 Tax Cas. 282, Macnaghten, J., held that the payment did not form part of the deceased's income, not having been received in his lifetime. " The dead have no income." The executor's claim for repayment of tax therefore failed, although the deceased's income was such that he could have obtained repayment of the whole of the tax suffered had the payment been made in the deceased's lifetime.

However, if personal representatives in general thus represent the deceased so far as concerns tax liabilities in respect of income received in his lifetime, it must not be assumed that as regards income received after his death they are necessarily to be identified with the beneficiaries. We see this quite clearly when we examine their position during the administration period, that is to say, the period which falls between the death of the deceased and the completion of administration by ascertainment of the residue of his estate and during which the personal representatives will get in the property forming the estate and will discharge the liabilities preparatory to assenting to the appropriate disposition under the will or intestacy. True, the title of an ordinary legatee relates back, on the personal representative's assent being

given, to the death (see "Williams on Executors," 12th ed., p. 908), and by a process of reasoning starting from that fact Rowlatt, J., held in *C.I.R.* v. *Hawley* [1928] 1 K.B. 578 that dividends declared during the administration period on shares *specifically* bequeathed were income of the legatee for the years in which they were receivable by the executors. Nevertheless it is clear from the decision of the House of Lords in *Sudeley* v. *Att.-Gen.* [1897] A.C. 11 that " the legatee of *residue* has no interest in any of the property of the testator until the residue has been ascertained. His right is to have the estate properly administered and applied for his benefit when the administration is complete." " Until the claims against the testator's estate for debts, legacies, testamentary expenses, etc., have been satisfied the residue does not come into actual existence . . . The probability that there will be a residue is not enough. It must be actually ascertained." The quotations are from the speeches of Lord Finlay and Lord Atkinson in *R.* v. *Special Commissioners, ex parte Dr. Barnardo's Homes* [1921] 2 A.C.1, a case in which the relevance of the point for income tax purposes first became apparent. An admitted charity, which was a residuary legatee of an estate of which the administration had been protracted by litigation, claimed repayment of the tax suffered by the executors on income arising during the administration period. It was held, however, that the executors did not receive such income as trustees for the charity, and the assent of executors to the bequest did not relate back to the testator's death so as to vest the accumulated income as such in the charity. What was ultimately paid over on the completion of the administration was the charity's share of the whole estate consisting of capital and accumulated income.

This decision operated in favour of the Crown, though so far as charities were concerned the advantage to the Revenue was for a time waived by the enactment of s. 30 of the Finance Act, 1922, repealed in 1938. But another side of the picture was revealed in *Corbett* v. *Commissioners of Inland Revenue* [1938] 1 K.B. 567, where sur-tax was involved. It was sought to bring into the computation of the total income of the life tenant of residue sums derived from income which had been credited to her and in part paid over to her during the administration period. These credits had been arrived at by applying the rule of apportionment laid down in *Allhusen* v. *Whittall* (1867), L.R. 4 Eq. 295, under which an adjustment is to be made to ensure that a testator's debts are equitably borne between those interested in the capital and those interested in income. The Court of Appeal held that, notwithstanding that such credits represented sums treated as income under the apportionment rule, they were not the life tenant's income for sur-tax purposes, the *Barnardo* case having shown the income of the estate during the administration period to be the executor's income and nobody else's.

It is to be noted that the point involved in these cases is not usually material for the purposes of the charge to income tax at the standard rate which, if it is not collected by deduction at source, can be assessed direct on the personal representatives if they are resident in the United Kingdom.

At this stage the Legislature stepped in in aid of the Revenue, and for 1937–38 and subsequent years the provisions of Pt. III of the Finance Act, 1938 (ss. 30–37), govern the normal case of this type. These provisions are complicated, and the Act itself should be closely studied by a practitioner called upon to advise on their effect. With this in mind, however, the following may be read as a brief introductory survey.

Part III affects the income for tax purposes of persons having, with regard to the estate of a deceased in course of administration—

(*a*) an " absolute " interest in residue. Broadly speaking, a person has such an interest when the capital of the residue or a part thereof is, on ascertainment, payable to him or for his benefit ; or

(*b*) a " limited " interest in residue. This exists when the income but not the capital of the residue or a part thereof is payable as aforesaid.

Residuary estates which are settled in succession will obviously give rise to limited interests, while all interests in residue not so settled will be absolute. The Act brings into the computation for relief and sur-tax purposes of the total income of a person having such an interest all amounts (being taxable income from property which devolves upon the personal representatives as assets for payment of the deceased's debts) which are, " in respect of " his interest, either (1) paid from the estate to such a person during the administration period, or (2) applicable for his benefit on the termination of the administration. Sums paid or payable as legacy duty in respect of the beneficiary's interest are excluded. The relevant year of assessment is the year in which sums are paid ; but on completion of the administration the sums paid or payable are to be adjusted for assessment purposes on the basis of accrual from day to day. Provision is made for " grossing up " payments made or payable out of income which in the hands of representatives has either borne United Kingdom income tax at the standard rate or is taxable by direct assessment upon them, by adding back the tax so borne or assessable ; so that for the purpose of the beneficiary's total income the effect is as if such payments reaching him had been subjected to deduction at source. In the case of income on which the representatives are not ultimately chargeable to income tax, a charge to income tax under Case IV of Sched. D is imposed as if it were the beneficiary's income from foreign securities.

An interesting tale hangs by the words " in respect of " quoted above from ss. 30 (2) and 31 (3). In *Cunard's Trustees* v. *Commissioners of Inland Revenue* (1946), 174 L.T. 133, a will authorised the application of capital of the residuary estate to supplement income payments to the life tenant thereof. Among the contentions of the Revenue in seeking to bring the supplementary payments into charge to tax was one founded on s. 30 of the 1938 Act. It was held, however, that the payments were not made " in respect of " the beneficiary's limited interest, but were paid under a discretionary power, so that the section had no application. Nevertheless the sums in question were held to be annual payments of an income nature, and so assessable under Case III of Sched. D quite independently of the 1938 Act. It is important to observe, however, that this conclusion was reached by the Court of Appeal only on an interpretation of the will which gave an unusual meaning to the term " residuary estate." Had it not been for this particular construction, it seems that the payments in question, made as they were before ascertainment of the residue, may have been unauthorised as being outside the terms of the discretion, and on this footing it is doubtful whether they would have been held taxable. The fact that supplementary payments have their origin in capital had been held in *Brodie's Trustees* v. *Commissioners of Inland Revenue* (1933), 17 Tax Cas. 432, not to preclude their being of an income nature, and the fact that they were discretionary in character was also immaterial (*Lindus & Hortin* v. *Commissioners of Inland Revenue* (1933), 17 Tax Cas. 442, where they were payable under the terms of a family arrangement). Approving these decisions the Court of Appeal in *Cunard's* case confirmed an assessment under r. 21 of the general rules on the executors in respect of the tax which they ought to have deducted on making the annual payments, and held that those payments were properly included in the total income of the beneficiary for sur-tax purposes.

" Z "

At a meeting of the United Law Society in the Barristers' Refreshment Room, Lincoln's Inn, on Monday, 12th January (Mr. F. R. McQuown in the chair), the motion "That the central government should exercise greater control over local authorities " was lost by one vote.

Mr. John M. Harwood completed sixty years' service with the Bradford solicitors, Messrs. Vint, Hill & Killick on 13th January. It was in the days of hand-written parchment that Mr. Harwood first joined the firm at the age of thirteen, and he has no intention of retiring yet.

Criminal Law and Practice

TAKING WITNESSES' STATEMENTS—II

A CORRESPONDENT, referring to the article on "Taking Witnesses' Statements," which appeared in our issue of 10th January (*ante*, p. 20), has sent us three letters from which he draws the conclusion that The Law Society's attitude differs from our expressed view. That view, which is one for which we take sole responsibility, was that on the authorities a solicitor has the right to take statements from any person who is willing to give them, but that there is a small risk that if a witness from whom a solicitor takes a statement is to be called by the prosecution, the solicitor may be suspected of tampering with the evidence.

The letters to which our correspondent refers are two letters from him to the Secretary of The Law Society and one reply from The Law Society. In his first letter, dated 30th December, 1946, he wrote :—

"Will you please advise me on the following point on which I can find no authority, and which is causing me a little concern as I have only recently commenced practice after returning from the army.

I am acting for the driver of a motor car who collided with a cow. A veterinary surgeon was called by the police, and I presume that he rendered an account to the owner of the cow. I telephoned him for an appointment and he informed me that he had given a statement to the other side and would not give me a statement without their consent. I accordingly telephoned the solicitors concerned, not for permission, but by way of courtesy, as I was of the belief that there is no property in a witness. The reply reads: 'We think it is somewhat unusual to expect us to consent to your interviewing our witnesses.'

Will you kindly let me have your opinion on this point ?"

The Law Society's reply, dated the 9th January, 1947, was :—

"The Council have expressed the opinion that solicitors acting for a defendant should be permitted to interview and take a statement from any person whom they believe to be able to give evidence, whether that person has or has not been approached, or even subpœnaed, by the prosecution ; and it follows from this view that the Council consider the prosecution are equally entitled to interview persons who have been approached or subpœnaed on behalf of the defence. In other words, in the view of the Council, solicitors should be permitted to conduct the affairs of their clients in accordance with the ordinary principles of law, and should not be hindered in that conduct by a rule of practice which the police assert exists, but for which the Director of Public Prosecutions has stated there is no legal authority. The Council did, in 1934, bring this view to the attention of the Director of Public Prosecutions."

Our correspondent's second letter, dated 10th January, 1947, pointed out that the case to which he had referred was a civil case, and asked whether the same considerations applied to civil cases. There was no reply to this letter, which, it should be made clear, intimated that a reply would not be expected unless different considerations arose.

Although in fact we were unaware of any "rule of practice" having been alleged by the police or any expression of opinion by the Director of Public Prosecutions as to its invalidity, we hasten to assure our correspondent that we entirely agree that there is no such rule. Nor do we doubt that a solicitor should be entirely free to interview anyone, whether in a civil or a criminal case, and even where a witness has been interviewed or subpœnaed by the police, where he considers that it is necessary to do so in his client's interest. The whole point of our previous article was, however, to indicate the risks attendant on doing so in certain cases, risks which should persuade a solicitor to think well before taking such a course. We must therefore respectfully deny that The Law Society's attitude differs from our expressed view, and trust that we have now made our point clear.

S. M.

A Conveyancer's Diary

DISCLAIMER OF LEGACIES

THE effects of war damage are widespread, and in a recent case which came to my notice demanded consideration with reference to the administration of a small estate. A testatrix, by her will made some years before the war, specifically bequeathed the leasehold house in which she was then residing and all her personal and household effects to her only surviving child, a daughter, and then left the residue of her estate in moieties to her daughter, on the one hand, and the issue of another daughter (who was dead at the date of the will), on the other hand. The testatrix died in 1947, leaving her surviving the one daughter, and several grandchildren, some of whom were infants. The leasehold house, which was the subject of the specific bequest, was at the date of the death held on a term of which only a few years remained unexpired, and the lease contained stringent covenants on the part of the lessee as to maintenance and repair of the structure. The house had been very severely damaged in the early part of the war by bombing, and in fact the testatrix had then been forced to remove to another residence. No attempt had been made to put the house into a habitable state, and the surveyor reported that the amount of the cost of works payment would be insufficient to meet the expense of putting the premises into such a condition of repair as would satisfy the terms of the lease on its expiration in a few years' time. In these circumstances the daughter gave notice to the executors that she would disclaim the bequest of the leasehold, but would expect to receive the other benefits to which she claimed to be entitled under the will. The effect of the disclaimer, if admitted, would have been to throw the burden of repairs on the residue, which would probably have been exhausted as a result ; but even so, the daughter would have taken the personal and household effects, which, having regard to the rise in the value of such articles, were worth considerably more than the whole of the small residue. The executors, who felt themselves bound to protect the interests of the infant beneficiaries, thereupon raised the question whether, in such a case, the daughter was entitled to disclaim the bequest of the house and still take the other benefits conferred upon her by the will.

The rule in regard to the disclaimer of testamentary gifts is easy to state : the difficulties arise in its application. The rule is that where two or more gifts are made to the same person by the same will, then if the gifts are independent gifts, that person is at liberty to reject one of the gifts without his title to receive the others being affected ; but where the gifts are not independent, but are made in such terms as to form one aggregate gift, it is not open to the beneficiary to reject one and take the other or others. He must then take all or none. The question is purely one of construction of the particular will, being based on the intention of the testator, who is presumed to have made such a division between those portions of his estate which are purely beneficial and those to which liabilities may attach, as to strike some sort of a balance between the various beneficiaries. The disclaimer of any one gift *prima facie* upsets that balance, and the onus is on the person seeking to disclaim to set up his right to do so.

On the face of it, the gift of a house followed by the gift of chattels which (whether so described in the will or not) are at the date of the execution of the will upon the premises, would appear to form one aggregate gift, so as to exclude the possibility of disclaiming the one and taking the benefit of the other. There is, however, authority to the contrary. In *Re Lysons* (1912), 107 L.T. 146, a similar provision was considered by the court, and it was decided that the gift of chattels was independent of the gift of the leasehold premises, although the latter was given (in the terms of the will) " together with " the chattels. The result of this case is so startling that it is interesting to consider whether it may be in any way distinguished, or whether it has to be followed on any general principle. The question is not an easy one, for there is no rule of thumb by which the well-settled principles of the law relating to disclaimer may be applied. For example, whether two gifts are independent, or whether they form one aggregate whole, does not depend on whether they are expressed in one clause or sentence or in two—see *Re Hotchkys* (1886), 32 Ch. D. 408, *per* Cotton, L.J., at pp. 417–8. To this extent, then, the decision of Joyce, J., in *Re Lysons, supra*, is justified, but it should be noted that the learned judge arrived at that decision with reluctance, and only in deference to authority which he felt, in the circumstances, to be binding upon him; for in some words prefatory to that part of the judgment in which various authorities were considered, he stated that in his opinion the two gifts were made together, and formed one gift, and that " it was indeed natural in the fitness of things that the house and furniture and contents should be given together to the same person."

In the light of this preliminary opinion, the ultimate conclusion deserves close scrutiny. The case of *Syer* v. *Gladstone* (1885), 30 Ch. D. 614, had been cited in argument as authority for the proposition that where a testator gives to any person a leasehold house and the furniture it contains, the legatee is entitled to take the furniture and disclaim the gift of the house. Joyce, J., decisively rejected that case as an authority for such a proposition, for reasons which are fully (and in my respectful opinion, correctly) stated in his judgment. Yet in his conclusion the learned judge accepted certain *dicta* of the Court of Appeal in *Syer* v. *Gladstone, supra*, which were made on the view that the case was, in fact, an authority for the proposition which he had earlier rejected as erroneous—viz., that a testamentary gift of a house and of chattels formed separate gifts, so as to allow of the beneficiary accepting the one and rejecting the other. In my view, it would have been open to Joyce, J., in this dilemma, to have availed himself of the principle that one will is seldom a useful guide to the construction of another, and to have decided the case before him in the light of his own expressed view of the purport of *Syer* v. *Gladstone*. In taking this course he would have found support in the guarded comments made on that case in *Re Hotchkys, supra*, by Lindley, L.J. (at p. 419), which were hedged by the proper qualification of being based on the construction of a particular will. In my view, the outcome of *Re Lysons* is not a necessary conclusion from any general principles relating to the law of disclaimer, and the decision is one which it should be possible to distinguish to-day. In the result, I so advised, and I think that any practitioner faced with a similar problem would do well to think twice, and to read the judgment in *Re Lysons* with more than ordinary care, before accepting that case as an authoritative decision on the point for which it is cited in most of the relevant text-books.

* * * * * .

It is not, I think, very generally recognised that the statutory power of advancement contained in s. 32 of the Trustee Act, 1925, enables an advancement to be made for the purpose of defraying the expenses of educating a beneficiary. The purpose for which this power, or a similar express power contained in an instrument, may be exercised is usually stated as being the conferment of some permanent benefit on the beneficiary, and exemplified by such objects as the payment of a premium on apprenticeship, payment of debts, etc. In *Re Garrett* [1934] Ch. 477, however, the purpose for which an advancement was required is reported as the provision of school fees and other incidental expenses in respect of an infant beneficiary who was entitled, contingently upon surviving her mother, to an interest in remainder. *Re Garrett* is usually cited in support of other propositions, but although the summons was adjourned to chambers and its ultimate result is consequently not known, the case would not have been argued at length on the other points, had its essential purpose been in doubt. The decision is, therefore, good authority for the statement made above, although cautious trustees may prefer to refer similar requests to the court. There is no reason to doubt that an express power in the usual form has the same effect.

" A B C "

Landlord and Tenant Notebook

" SUBSTANTIAL PORTION OF THE RENT "

JUST over twenty-seven years ago, the first quarter of a quarterly tenancy of a maisonette (basement and ground and first floors) at Brighton was drawing to its close, and the two tenants were negotiating with their landlady for a variation of its terms. Under those terms, they paid, in addition to the rent of £32 10s. a quarter, a further sum of 25s. per quarter for the use of linoleum which covered all the floors of the ground floor rooms and one first floor room and the bathroom and lavatory. The tenants possessed suitable floor covering themselves, and did not want to pay for its storage; and they proposed that that owned by the landlady should be removed, and the rent reduced. The landlady refused to remove it as it was fitted to the rooms, but did enter into a new tenancy agreement at a rent of £20 a quarter " to include the use of the linoleum in the maisonette." But a year or so later the tenants, having ascertained that the whole house had a standard rent of £55 a year, took out an apportionment summons. The objection was raised that the dwelling-house was " *bona fide* let at a rent which included payments in respect of furniture," and was therefore excluded from the operation of the Increase of Rent, etc. (Restrictions) Act, 1920, by proviso (i) to s. 12 (2) thereof, as it then stood. The county court registrar rejected this contention on the ground that the linoleum had not formed a *substantial part* of the consideration in the minds of the parties, basing this conclusion on two facts: (*a*) its trifling value, and (*b*) the tenants had not wanted it. The county court judge overruled this decision, taking the view that the " *bona fide* " qualification merely aimed at colourable evasion, the presence of which in this case was negatived by the fact that 25s. a quarter had once been allocated to the linoleum. In the Divisional Court the two judges disagreed; Salter, J., approved the county court judge's reasoning, while Avory, J., went further than the registrar had gone by holding that the exclusion did not apply unless the premises were let as a furnished house. In the Court of Appeal there was further disagreement. Younger, L.J., delivered a minority judgment in which, while disapproving that of Avory, J., he considered that there must at least be sufficient furniture to justify a finding that the house was not let unfurnished, while Bankes and Scrutton, L.JJ., laid down that the test was whether the use of the furniture was so trivial a matter as to be negligible.

I have set out the above facts and views, found and expressed in *Wilkes* v. *Goodwin* [1923] 2 K.B. 86 (C.A.), because it is not unreasonable to suppose that news of the divergences of opinion reached the ears of the Legislature and account for the enacting, a few months after the decision of the Court of Appeal, of s. 10 of the Rent, etc., Restrictions Act, 1923: " For the purposes of proviso (i) to subs. (2) of

s. 12 of the principal Act . . . a dwelling-house shall not be deemed to be *bona fide* let at a rent which includes payments in respect of . . . the use of furniture unless the amount of rent which is fairly attributable to the . . . use of furniture, regard being had to the value of the same to the tenant, forms a substantial portion of the whole rent." It is perhaps not too much to say that in endeavouring thus to clarify the position Parliament was showing that it thought rather more highly of the interpretation of its wishes given by the registrar of Brighton County Court than of those formed by the six other members of the judiciary who had been called upon to perform that task. For both of the registrar's points—the trifling value point and the tenants-had-not-wanted it point—appear to be reflected in the wording of the amendment.

Cynics may suggest that the result of the said endeavour has been such as to afford yet another instance of *obscurum per obscurius*, and now that the House of Lords has modified some of the views expressed in what was expected to be the final authority of the subject in *Property Holding Co., Ltd.* v. *Mischeff* (1946), 90 SOL. J. 453; [1946] 2 All E.R. 294 (C.A.); (p. 53 of this issue), it can only be said that the practising lawyer, called upon to advise his client on the status of a dwelling-house, is in rather a less happy position than before.

The facts of the case (discussed in 90 SOL. J. 485), so far as relevant, were that a flat was let at £375 with £155 of furniture. (The question what was, and what was not, furniture will be dealt with in a later article.) To apply the proviso, as amended, to these facts involved careful examination of the whole of the enactment and giving effect to a number of expressions, such as "fairly," which compose it. In his speech—the only one delivered in the House of Lords—Lord Simon began by dealing with the question whether "*bona fide*" qualified "let" only and held that it governed the whole phrase "let at a rent which includes payments in respect of . . . use of furniture": the rent to be paid must genuinely include payments in respect of the use of furniture.

Rather more difficult questions arose when dealing with the words and phrases of the explanatory amendment. To interpret "the amount of rent which is fairly attributable to the use of furniture, regard being had to the value of the same to the tenant" required consideration of the meanings of "amount of rent," "fairly," "regard being had" and "the tenant." "Amount of rent," Lord Simon held, was the same thing as "the portion of the whole rent" with which the amending enactment concludes. But his lordship proceeded to consider what was meant by "the tenant" before dealing with the other words and phrases, and decided that it indicated the actual tenant whose lease was under examination and not the "average or normal tenant for that class of property." In arriving at this conclusion the learned Lord Chancellor pointed out that the "regard being had to" provision, with which he dealt next, supported this view; but what is not quite clear is whether "the tenant" can mean the grantee only, or whether an assignment of the term might effect a change of status. It is a pity that this point was not discussed, for the speech refers to the right to assign or sub-let as constituting part of the value to the tenant.

Coming to the words "regard shall be had to," Lord Simon warned us that while of great importance they did not mean that what followed was all that had to be taken into account. Their function was to exclude or discount articles left for the convenience of the landlord or greater in quantity than the size of the flat and the needs of the tenant warranted.

From the remarks that follow it appears, however, that it is not easy to apply consistently the proposition that "the tenant" means the particular tenant. "If a landlord insists on letting a three-roomed flat with the use of a number of chairs and tables in excess of what the tenant of *such a flat* can reasonably need, then the phrase under discussion will limit," etc. Then the speech goes on to refer to the value to the tenant of pictures which the landlord insists on leaving on the walls; but perhaps this is not inconsistent with the view that whether the particular tenant would pay to enjoy the sight or would pay to have them out of his sight is not to be gone into. But—and this is perhaps the gist of the new authority—the "fairly" demands consideration of a number of factors, the chief one being that if and so far as the landlord does not provide furniture which *the* tenant would *normally* require to use, the tenant would have to provide it himself. The solution seems to be that the more necessary the articles supplied are, the greater their importance, market value being immaterial.

The much argued question of what is meant by "substantial portion" was next adjudicated upon and here the decision—while its correctness is not, of course, to be disputed—must prove unhelpful. For while the judgment of Morton, L.J., suggesting a method of valuation and calculation by reference to percentages, amounted, according to Lord Simon, to a usurpation of the functions of Parliament, it did give us a yardstick. True, the result was that in at least one county court the question was invariably referred, the judge refusing to undertake assessment; but the criterion has been replaced by "considerable, solid, or big," all relative terms, and the guidance given is that it must be left to the discretion of the judge "to decide as best he can according to the circumstances in each case." The illustrations given—a substantial fortune, a substantial meal, a substantial man, a substantial argument or ground of defence—will not, I cannot help feeling, assist a practitioner who has to advise a client on a problem of this kind; for while the noun qualified is "portion" and not "proportion," what is indicated is a relationship between quantities rather than a difference in kind.

Lastly, it was laid down, as might have been expected, that the "whole" rent means the contractual rent reserved, no deduction to be made in respect of rates when these are paid by the landlord. Analysis, though made in the interests of justice, has frequently been frowned upon by the courts, and the House of Lords approved the decisions to that effect.

And I rather think that, without the assistance of the declaratory amendment, the registrar who first heard *Wilkes* v. *Goodwin* would have reached the same conclusion in *Property Holding Co., Ltd.* v. *Mischeff* as has the House of Lords.

R. B.

TO-DAY AND YESTERDAY

LOOKING BACK

ON 24th January, 1880, Stuart Archibald Moore was admitted to the Inner Temple. He was born in 1842 and in the interval before he took to the law he had been secretary to Sir Thomas Duffus Hardy, deputy keeper of the public records, and had practised as a record agent. Firmly established in his reputation as an antiquary, he applied his erudition to the branches of the law that gave it most scope, and after his call to the Bar in 1884 he specialised in problems of foreshore rights and fisheries, and immediately obtained an excellent practice. He became a thorn in the flesh of the Crown lawyers, persistently and successfully opposing the foreshore claims which they maintained. In 1888 he published a "History of the Foreshore and the Law Relating Thereto," which was full of curious extracts from ancient records. He was among the finest amateur seamen of his day and he wrote a book on "The Thames Estuary, its Tides, Channels, etc., a Practical Guide for Yachts." In his 80-ton fishing ketch he carried the Vice-Commodore's flag of the Royal Cruising Club all round Great Britain and most of Ireland with little regard to the weather. He was the most generous and genial of men and loved to entertain his numerous friends on board. About 1905 he was attacked by paralysis in his lower limbs and retired to his boat, where he lived bravely and cheerfully. There he died somewhat suddenly at Southwick in June, 1907.

SPILSBURY'S CASES

IT is reported that, since the tragic end of Sir Bernard Spilsbury, scientists have begun sorting 6,000 filed cards, each bearing a note of a case which was to go into a book he was planning, but that the notes are so terse as to constitute a major puzzle. The

book would have been of purely scientific interest and would have omitted many of his more famous murder cases. For a quarter of a century it had seemed as if, as senior pathologist to the Home Office, he was indispensable in every major murder trial. Crippen, George Smith, Voisin, David Greenwood, Armstrong, Bywaters and Mrs. Thompson, Vaquier, Mahon, John Robinson, Henry Seymour—in all their cases his evidence was of vital importance, and it is strange to think that his immortality should spring from so many graves. It is strange, too, that the most remote of those trials, that of Dr. Crippen, at the Old Bailey, in 1910, should still be far more vividly remembered than many of the later ones. It was that case that established Spilsbury's reputation, for it was his first experience as a scientific witness for the Crown in a sensational trial. His microscopic examination of a piece of flesh bearing a scar was a vital link in the chain of the evidence. No less sensational was another Old Bailey murder case, that of George Smith, the "brides in the bath" killer, in 1915, in which he was one of 112 witnesses called for the prosecution, setting the seal of his opinion on the method suggested to have been employed by the prisoner, lifting up the legs of his helpless and unsuspecting victims, so as to submerge their heads in the water.

MURDER IN AN AIR RAID

LESS well remembered is another of Spilsbury's early cases, the trial of Louis Voisin, a French butcher, in 1917, for the murder of Emilienne Gerard, his former housekeeper. The crime was one of particular atrocity, for the woman had been bloodily battered to death in a Soho basement during an air raid on London and the body had afterwards been dismembered. It fell to Dr. Spilsbury to examine the remains. The bruising on the limbs suggested a struggle, and he found signs of asphyxia. He deduced that the woman had been battered with a blunt instrument as she lay on the floor while she attempted to ward off the blows. Now Voisin did not stand alone in the dock. With him was his new mistress, Berthe Roche, who had supplanted Emilienne during a temporary absence. The manner of the killing as envisaged by Spilsbury rather suggested a struggle between the women, for the powerfully-built butcher could obviously have done the work far more effectively and quickly. Still, he had clearly used his skill to dismember the corpse and he chivalrously insisted on the innocence of Berthe. In the result, he alone was convicted and hanged, but subsequently she was convicted as an accessory after the fact and sentenced to seven years' penal servitude. She became insane in prison and died in 1919.

REVIEWS

Guide to Crown Office Practice. By J. O. GRIFFITHS, of the Central Office, Supreme Court of Judicature. With a foreword by The Rt. Hon. LORD GODDARD, Chief Justice. 1947. London: Sweet & Maxwell, Ltd.; Stevens & Sons, Ltd. 35s. net.

The machinery for the enforcement of our rights as individuals becomes increasingly important with every new advance in the powers of the State, and this work deals mainly with that machinery. It has been wanted for a long time, as Lord Goddard points out in a foreword. The author has had many years of experience in the Crown Office, and puts forward the result of that experience in this book. No doubt many members of the Bar, solicitors and their clerks, will now consult the book instead of the author, as they were previously wont to do. They will find it easy to use, as the print is large, the style is lucid and the arrangement and accuracy admirable. Particularly useful are the references which commence: "The practice now established is . . ." Indeed, it appears from the preface that Lord Goddard himself read the manuscript and advised on the practice of the Divisional Court and other proceedings in the King's Bench Division. Another useful and, indeed, unique feature is the number of unreported cases which are cited; e.g., under that not unimportant subject "Mandamus" there are at least six such citations. This will certainly be a standard work for many years to come. In addition, binding, paper and printing are a pleasure to behold in these days of want.

Justice and Administrative Law. By WILLIAM A. ROBSON, of Lincoln's Inn, Barrister-at-Law. Second Edition. 1947. London: Stevens & Sons, Ltd. 25s. net.

In a continually changing subject such as this a second edition (the first was published in 1928) was a necessity. The constitutional and economic map has much changed in twenty years, and so we find that the learned author has completely re-written the chapter on Administrative Tribunals and has written two new chapters on the "Committee on Ministers' Powers" and the "Attitude of the Judicature." The author has sat on the bench of many administrative tribunals and as he was the first writer to produce a treatise on this subject in this country, it is good to know that he considers that, broadly speaking, the trend is in the right direction in regard to their structure, functions and procedure. With respect, a mere lawyer, who is apt, perhaps, to exaggerate his own importance in the scheme of things, would suggest that the increasing tendency to exclude the legal profession from any right of audience is not altogether good. Dr. Robson apparently agrees, although the space he devotes to this important matter may not seem to be enough to the practising lawyer (p. 461). It may also be hoped that *Liversidge* v. *Anderson* [1942] A.C. 206 will not be omitted from future editions, and will receive its appropriate comment, which we have failed to find in this edition. However, the inability of the judiciary to control executive power in some cases may be regarded by the author as not germane to his subject, because, as he states, at p. 33: "Neither the executive nor the judiciary has any immutable 'right' to a particular province; it is merely a matter of expediency what powers are allocated to either of them at any particular time; and the social welfare is the only valid test of what is desirable." The answer is, of course, that ideas as to what is social welfare vary considerably, and are used to justify the ukases of a totalitarian State. One is impressed by the wide sweep of the author's range, and the immensely detailed learning which supports this reasoned and able treatise.

BOOKS RECEIVED

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The Industrial Law Review. Vol. 2, No. 7. December, 1947. Leigh-on-Sea: The Thames Bank Publishing Co., Ltd.

Journal of Comparative Legislation and International Law. Third Series. Vol. 29, Pts. III and IV. November, 1947. London: The Society of Comparative Legislation. 10s. net.

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The Trial of German Major War Criminals. Part 14. 1947. pp. ix and 408. London: H.M. Stationery Office. 7s. net.

Mews' Digest of English Case Law, 1946. Twenty-second Annual Supplement. By G. T. WHITFIELD HAYES, Barrister-at-Law. 1947. pp. xii and (with Index) 395. London: Sweet and Maxwell, Ltd.; Stevens & Sons, Ltd. 25s. net.

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The General Law of Landlord and Tenant. By the late EDGAR FOA, M.A., of the Inner Temple, Barrister-at-Law. Seventh Edition. By His Honour Judge FORBES. 1947. pp. cliv and (with Index) 969. London: Hamish Hamilton (Law Books), Ltd. 75s. net.

The Lawyer's Companion and Diary, 1948. One Hundred and Second Year of Publication. By ERNEST L. BUCK and LESLIE C. E. TURNER. pp. xxv and 981. London: Stevens & Sons, Ltd.; Shaw & Sons, Ltd.

World Affairs. Vol. 2 (New Series), No. 1. January, 1948. London: Stevens & Sons, Ltd. 2s. 6d. net.

Hindu Law in British India. By S. V. GUPTE, B.A., LL.B. Second Edition. 1947. pp. lxxvii and (with Index) 1170. Bombay: N. M. Tripathi, Ltd.

Jordan's New Company Law. The Companies Act, 1947. By L. J. MORRIS SMITH, of Gray's Inn, Barrister-at-Law. 1948. pp. viii and (with Index) 238. London: Jordan & Sons, Ltd. 10s. 6d.

NOTES OF CASES

HOUSE OF LORDS

RENT RESTRICTION: FLATS WITH FURNITURE AND SERVICES

Property Holding Co., Ltd. *v.* Mischeff
Palser *v.* Grinling;

Lord Simon, Lord Thankerton, Lord Porter, Lord Uthwatt and Lord MacDermott. 19th December, 1947

Appeals from two decisions of the Court of Appeal respectively affirming a decision of Lord Goddard, C.J., and reversing a decision of Henn Collins, J.

The appeal in each case was by the landlord, against whom the respondent tenant claimed that the flat demised was within the Rent Restrictions Acts, the landlord in each case claiming that it was not, because the rent included payment in respect of furniture or attendance. By s. 3 (2) of the Rent and Mortgage Interest Restrictions Act, 1939, the Rent Restrictions Acts " shall not, by virtue of this section, apply . . . to any dwelling-house *bona fide* let at a rent which includes payments in respect of board, attendance or use of furniture." By s. 10 (1) of the Act of 1923, as amended by the Act of 1939: " for the purposes of " s. 3 (2) (*b*) of the Act of 1939, " a dwelling-house shall not be deemed to be *bona fide* let at a rent which includes payments in respect of attendance or the use of furniture unless the amount of rent which is fairly attributable to the attendance or the use of furniture, regard being had to the value of the same to the tenant, forms a substantial portion of the whole rent."

VISCOUNT SIMON, in whose opinion the other noble lords concurred, laying down the principles applicable, said that: (1) In s. 3 (2) (*b*), " *bona fide* " governed the whole of the words which followed. The words amounted to a stipulation that the rent to be paid genuinely included payments in respect of board, attendance or use of furniture; the Act was not to be evaded by a merely colourable use of words. (2) Attendance meant service personal to the tenant performed by an attendant provided by the landlord in accordance with his covenant for the benefit or convenience of the individual tenant in his use or enjoyment of the demised premises. " Service " was a wider word than attendance. Services common to others (for example, the heating of a communal water supply, or the cleaning of passages, halls, etc., outside the demised premises) would not constitute attendance. (3) " Furniture " had a statutory meaning, which could not be extended merely because the landlord stipulated in the lease that certain things were to be regarded as " furniture " when, in fact, they did not fall within the proper interpretation of the word. Secondly, " furniture " must consist of articles in which the landlord had a proprietary right as against the tenant. Thirdly, the expression " use of furniture," in s. 10 (1) of the Act of 1923, referred to articles provided for the use or enjoyment of the dwelling in question and not for halls and passages used in common with other tenants in a block of flats. In arriving at what was " furniture " it was necessary to exclude articles which, at the beginning of the demise, constituted part of the dwelling-house itself. Further, of articles provided for the use or enjoyment of the dwelling-house, only those which were commonly and currently regarded as " furniture " could rank as such. Articles belonging to the landlord otherwise entitled to rank as " furniture " for the purposes of s. 10 should, if affixed to the fabric, be regarded as part of it if they could not be detached without appreciable damage to or alteration of the fabric or themselves. Otherwise they should be regarded as furniture. (4) The " amount of rent " was equivalent to the " portion of the whole rent." The figure to be arrived at was referable to the value to the tenant of the landlord's covenant to provide furniture or attendance, not to the cost of the furniture to the landlord. The value to the tenant also did not control the matter, since it was merely a matter to which regard was to be had. " The tenant " referred to was the actual tenant in question and not the average tenant. (5) The phrase " substantial portion " required a comparison with the *whole rent*. The whole rent meant the entire contractual rent payable by the tenant in return for the occupation of the premises together with all the other covenants of the landlord. " Substantial " was not the same as " not unsubstantial," that was, just enough to avoid the *de minimis* principle. It was beyond the powers of the court to solve the question what was " substantial " by fixing percentages. (6) The " whole rent " was the entire contractual rent payable by the tenant to his landlord. Where the landlord covenanted to pay rates, it would be an error to deduct the rates from the contractual rent in order to arrive at the whole rent. Appeals dismissed.

APPEARANCES: (First appeal) *Sir Valentine Holmes*, K.C., and *James MacMillan* (*Griffinhoofe* and *Brewster*); *Cartwright Sharp*, K.C., *Alexander Karmel* and *Denis Murphy* (*Lipton* and *Jefferies*). (Second appeal) *Sir Valentine Holmes*, K.C., *Scott Henderson*, K.C., and *Raymond Stock* (*Markby, Stewart and Wadesons*); *Raeburn*, K.C., and *Hackforth-Jones* (*J. M. Menassé and Co.*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

WRONG PROCEDURE: MANSLAUGHTER CONVICTION QUASHED

Joseph *v.* The King

Lord Uthwatt, Lord Oaksey, and Sir John Beaumont
12th January, 1948

Appeal from conviction by the Supreme Court of Fiji.

The appellant was convicted of the manslaughter of a child. The trial was with five assessors. The main ground of appeal was that the Chief Justice, instead of recording the opinion of the assessors and then delivering judgment himself, as required by s. 308 of the Criminal Procedure Code of Fiji, treated the assessors as if they were a jury, summed up the evidence to them as if the final decision as to the guilt or innocence of the appellant rested with them, treated their opinions as a verdict, and finally passed sentence without delivering any judgment as required by the code. It was contended that that was much more than an irregularity; that the trial had been carried out in a way which the code did not authorise; and that that amounted to a substantial miscarriage of justice justifying the Board's intervention. It was contended for the Crown that, as the Chief Justice had clearly stated that he agreed with the conclusion of the assessors, no substantial injustice had been done and the Board should act in accordance with its rule in such circumstances and dismiss the appeal.

Sir JOHN BEAUMONT, giving the judgment of the Board, said that in the result the appellant had been convicted by assessors who had no power to try or convict him, and sentenced by a judge who had not convicted him, and who had left the appreciation of evidence to the assessors, and accepted their conclusion as the verdict of a jury which bound him, instead of regarding it merely as an opinion which might help him in arriving at his own conclusion. The appellant was entitled to be tried by the judge, and he had not been so tried. Appeal allowed.

APPEARANCES: *Dingle Foot* and *Gavin Simonds* (*Barrow, Rogers & Nevill*); *F. Gahan* (*Burchells*).

[Reported by R. C. CALBURN, Esq. Barrister-at-Law.]

COURT OF APPEAL

SALE OF LAND "SUBJECT TO CONTRACT": EXCHANGE OF CONTRACTS

Eccles *v.* Bryant and Another

Lord Greene, M.R., Cohen and Asquith, L.JJ.

3rd December, 1947

Appeal from Vaisey, J.

The facts are set out in the report of the case below (91 SOL. J. 384). The vendor appealed.

LORD GREENE, M.R., said that it had been the intention of the parties that the respective solicitors should carry out the transaction in the customary way, by preparing two copies of the contract, obtaining the clients' signatures and exchanging the copies. Exchange might be over the table or by post; if by post, the contract would come into existence when the later of the two documents to be posted was put in the post. When there was a well-known and customary method of dealing, such as exchange, parties who contemplated that method could not contemplate the coming into existence of a binding contract before the exchange took place. Exchange was of crucial significance. If a contract came into existence before exchange took place, neither party could call on the other to hand over his part. One could not say that the necessity for exchange was a discredited doctrine, or that the old authorities were wrong, in view of the weighty opinions to the contrary in *Chillingworth* v. *Esche* [1924] 1 Ch. 97, and *Trollope* v. *Martyn* [1934] 2 K.B. 436. It appeared that Vaisey, J., had taken a similar view of the law, but had held that in the letter of 11th June, the vendor's solicitors had indicated that they would regard the contract as complete if the purchaser's copy was posted without delay. But the letter did not bear that construction, and if it did, the solicitors would have been acting without authority and in breach of their duty to their client. It was of the utmost importance that the well-known principles

regarding exchange should be maintained. Inconvenience and chaos would result from the adoption of any other rule. The appeal should be allowed.

COHEN and ASQUITH, L.JJ., agreed.

APPEARANCES: *N. Gray*, K.C., and *H. A. Rose* (*Nisbet, Drew and Loughborough*, for *Pearless, de Rougemont & Co.*, East Grinstead); *Fox-Andrews*, K.C., and *R. E. Hopkins* (*Godfrey Warr & Co.*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law.]

DIVORCE: APPLICATION FOR REINSTATEMENT OF APPEAL

Meier *v.* Meier

Scott, Somervell and Evershed, L.JJ. 15th December, 1947

Application for reinstatement of an appeal.

On 31st July, 1947, a decree *nisi* was granted to the respondent on her petition for divorce from the applicant. On the wife's application to the Court of Appeal for security for her costs of the husband's appeal against the decree *nisi*, the court ordered £50 to be lodged in court on or before 27th October. The husband's solicitors having inadvertently not lodged the money by that date, the appeal stood dismissed, and on 31st October the decree was made absolute on the application of the wife's solicitors. The husband now sought to have the decree absolute set aside, contending that the court had power, by virtue of its inherent jurisdiction, to vary its order. By s. 31 of the Supreme Court of Judicature (Consolidation) Act, 1925: "No appeal shall lie . . . from an order absolute for the dissolution . . . of marriage in favour of any party who having had time and opportunity to appeal from the decree *nisi* . . . has not appealed . . ."

SCOTT, L.J., said that the husband, having had "time and opportunity" to appeal from the decree *nisi* and not having done so, had lost his right of appeal by virtue of s. 31. If the court had power to set aside the decree absolute, it could only be in the exercise of its inherent jurisdiction, since no rule covered the matter.

SOMERVELL, L.J., agreeing, said that he thought it impossible to imply that the court had inherent jurisdiction to deprive a party of rights acquired under an order of the court in circumstances of complete regularity on his part.

EVERSHED, L.J., agreeing, said that, even if, which it was unnecessary to decide, the court had inherent jurisdiction to reinstate the appeal, something more would be required, to justify the court in doing so, than a variation of its order under that jurisdiction.

Application refused.

APPEARANCES: *Karminski*, K.C., and *W. B. Franklin* (*Eric B. Politzer & Co.*); *Melford Stevenson*, K.C., and *Marshall-Reynolds* (*Haslewood, Hare & Co.*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

SALE OF LAND: RECEIPT NOT A CONTRACT

Beckett *v.* Nurse

Lord Goddard, C.J., Tucker, L.J., and Jenkins, J. 19th December, 1947

Appeal from Pontefract County Court.

The plaintiff, as administratrix and widow of her husband, claimed specific performance of an agreement to sell him a plot of land. The document on which she relied as constituting the agreement stated: "Received from [the plaintiff's husband] the sum of seventeen pounds being a deposit for a field situate near the Fox Inn. Sold for fifty pounds." Over a twopenny stamp were the date and the defendant's signature. To the right of it was a second signature by the defendant, with his address. There was also a rough plan. The defendant pleaded, and gave evidence of, an oral agreement containing various other terms. The plaintiff alleged and the defendant denied part performance of the agreement if oral. The county court judge held that the receipt amounted to an agreement in writing, and that, accordingly, no oral evidence was admissible to contradict or vary it, and gave judgment for the plaintiff. The defendant appealed.

TUCKER, L.J., asked to give judgment first, said that in his opinion the document in question was not a contract. It did not on its face bear any signs of being intended to be a contractual document. That it was only signed by one of the parties was significant, though not conclusive, any more than were the facts that the document contained a plan, or that the defendant had signed it in two places, neither of which matters, moreover, led to the conclusion that the document, by itself, was the agreement reached between the parties. As the plaintiff was, therefore, suing on an oral agreement, it was permissible for the defendant to give evidence to show that the actual bargain between the parties was different from that stated in the receipt as memorandum. The case must go back to the judge for him to decide what the oral agreement between the parties in fact was.

JENKINS, J., agreeing, said that, while in his opinion the receipt was not a contract, the fact that it was an informal document did not mean that it could not be a document intended by the parties to embody all the terms of the agreement reached by them.

LORD GODDARD, C.J., while expressing doubt as to the proper construction to be placed on the receipt, did not dissent.

Appeal allowed. Case remitted.

APPEARANCES: *J. A. Armstrong* (*Blundell, Baker & Co.*, for *Carter, Bentley & Gundill*, Pontefract); *Lindner* (*Biddle, Thorne, Welsford & Barnes*, for *Moxon & Barker*, Pontefract).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

CHANCERY DIVISION

BROADCASTER'S FANCY NAME: PASSING OFF

McCulloch *v.* Lewis A. May (Produce Distributors), Ltd.

Wynn Parry, J. 28th November, 1947

Action.

The plaintiff was a very well-known broadcaster, universally known as "Uncle Mac" in connection with the children's hour programmes, which he had appeared in or directed for twenty years. He had also written a number of books and made gramophone records under that name. In 1944 the defendant company began to manufacture and sell a food styled "Uncle Mac's Puffed Wheat," contained in cartons which bore *inter alia* the words "Uncle Mac loves children, and children love Uncle Mac." The plaintiff brought an action for passing-off.

WYNN PARRY, J., said that there was no exclusive right to a fancy name *in vacuo*; to succeed in a passing-off action a plaintiff must show that he enjoyed a reputation in that name in respect of some profession, business or goods, and that the defendant's acts were such as to mislead the public into confusing the defendant's profession, business or goods with those of the plaintiff. The cases had been reviewed in *British Medical Association* v. *Marsh*, 48 R.P.C. 565, and other recent relevant cases were the "*Albert Hall*," 51 R.P.C. 398 and "*Clock House*," 53 R.P.C. 269 cases. In all the cases cited, there had been a common field of activity in which, however remotely, both the plaintiff and the defendant were engaged, and it was the presence of that factor which grounded the jurisdiction of the court. There was no such common field of activity in this case, and no cause of action in passing-off had been established. The very slight evidence, such as it was, that certain members of the public had associated the defendant's product with the plaintiff, might or might not have been relevant in an action for libel such as *Tolley* v. *Fry* [1931] A.C. 333, as to which he would say nothing. The action would be dismissed.

APPEARANCES: *Shelley*, K.C., and *K. R. Johnston* (*Turner and Evans*, for *Gosling & Wilkinson*, Weybridge); *Sir Walter Monckton*, K.C., *James Mould*, and *R. G. Lloyd* (*Allen & Overy*).

[Reported by F. R. DYMOND, Esq., Barrister-at-Law.]

DISSOLVED COMPANY: FREEHOLDS HELD IN TRUST

***In re* Strathblane Estates, Ltd.; *In re* the Trustee Act, 1925**

Jenkins, J. 12th January, 1948

Adjourned summons.

The S company, which had held a number of freehold properties, sold some of these, and the applicants (who owned all the share capital) decided that the company should be wound up and the remaining properties divided among themselves. This was reported at a directors' meeting held in March, 1938, and recorded in the minutes. In April, 1938, the company, in extraordinary general meeting, resolved to wind up and appointed a liquidator. The company was dissolved in April, 1942, no action having been taken to convey to the applicants the legal estate in the properties. The applicants asked for an order that the estate and interest in the properties which immediately prior to its dissolution were vested in the company should vest in the applicants for the estate and interest and upon the trusts on which such properties were held by the company.

JENKINS, J., said that on the evidence the company had been a trustee for the applicants as was shown by the entries in the minute books and the handing over of the title deeds to the applicants. The case fell within s. 44 (2) of the Trustee Act, 1925. Confusion had been imported into the matter by s. 181 of the Law of Property Act, 1925, which seemed to imply

that when a company was dissolved the legal estate in properties vested in it was terminated. This idea, which seemed to originate from *Hastings Corporation* v. *Letton* [1908] 1 K.B. 378, had been adopted in the note to Ord. 53 (*b*), r. 5, appearing at p. 1058 of the *Annual Practice* for 1946–7, but the *Hastings* case had been disapproved by the Court of Appeal in *In re Wells* [1933] Ch. 29; it was not the case that the legal estate terminated in all such cases, and when the legal estate was still subsisting there was no need to create a new one. Under s. 296 of the Companies Act, 1929, the properties vested in the Crown, subject to the trusts which had bound the company. It was improper to include a reference to the Law of Property Act, 1925, as the note in the *Annual Practice* prescribed, in the title of the summons. The conclusion arrived at agreed with the view expressed in "Challis on Real Property," at p. 467. All that was required was a vesting order under s. 44 (*2*) of the Trustee Act, 1925. The order would be as prayed, with directions that the applicants should hold the properties as joint tenants on statutory trusts for sale, and that the order should be produced to the Land Registry in compliance with the practice note set out in [1932] W.N. 6.

APPEARANCES: *H. Lightman* (*D. B. Levinson & Shane*), for the applicants; *Danckwerts* (*Treasury Solicitor*), for the Attorney-General.

[Reported by F. R. DYMOND, Esq., Barrister-at-Law.]

KING'S BENCH DIVISION

RATING: GROUNDS FOR PROPOSAL INSUFFICIENTLY SPECIFIED

R. *v.* Winchester Area Assessment Committee, *ex parte* Wright

Lord Goddard, C.J., Humphreys and Croom-Johnson, JJ.
29th October, 1947

Application for an order of certiorari.

A proposal was made for the amendment of the current valuation list by increasing the assessment of the applicant's premises. The proposal stated the existing assessment, gross and rateable, and the proposed increase, specifying the grounds for the proposal in the words "revised assessments." The applicant sought to have the assessment committee's determination of the proposal brought up to be quashed on the ground that the grounds for the proposal were insufficiently stated to comply with s. 37 (*2*) of the Rating and Valuation Act, 1925, which provides that every proposal "must specify the grounds on which the proposed amendment is supported."

LORD GODDARD, C.J., said that the case was indistinguishable from *Bent's Brewery Co., Ltd.* v. *Upper Aggbrigg Assessment Committee* [1944] K.B. 524; 171 L.T. 341, where the words used were "annual revision," and that the determination must be quashed. He was bound to follow that case, but he hoped that it and the present case might come up for review by the Court of Appeal.

HUMPHREYS and CROOM-JOHNSON, JJ., agreed, Croom-Johnson, J., saying that he still thought the *Bent's Brewery* case, *supra*, rightly decided. Order for certiorari.

APPEARANCES: *Squibb* (*Lovell, Son & Pitfield*, for *Paris, Smith & Randall*, Southampton); *J. R. Willis* (*J. J. McIntyre*, for *J. C. Gardner*, Eastleigh).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

JUDICIAL SEPARATION: WIFE IN HUSBAND'S HOUSE

H. *v.* H.

Denning, J. 24th November, 1947

Appeal (adjourned into court for judgment) from Master O'Donnell.

The appellant wife, the respondent, her husband, having left her, obtained a decree of judicial separation, but continued to live in the house, owned by the husband, which had been the matrimonial home. The husband's claim under s. 17 of the Married Women's Property Act, 1882, to possession of the house, was resisted by the wife on the ground that the house was the only home of herself and their son, who was seriously ill; that it would be physically and psychologically injurious to his health if they had to leave; that she had refused to accede to her husband's request that she should divorce him; and that the husband owned another house in which he was living with another woman. The master made an order for possession. The wife appealed.

DENNING, J., said that the husband had no right at common law to turn the wife out of the house, she having done no wrong. The intention of s. 17 was that, in the innumerable and infinitely various disputes as to property which might occur between husband and wife, the judge should have a free hand to do what was just. That discretion was in no way fettered, though it must be exercised judicially. If the decree of judicial separation had not been made, the husband could clearly not turn the wife out. The granting of the decree did not affect the legal position. Appeal allowed.

APPEARANCES: *Stranders* (*Curwen, Carter & Evans*); *C. E. Rochford* (*H. G. Greenwood*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

EMPLOYMENT AGENCY LICENCE: INVALID CONDITION

Middlesex County Council *v.* Miller

Lord Goddard, C.J., Singleton and Byrne, JJ.
13th January, 1948

Case stated by Middlesex Justices.

The respondent carried on an agency for the supply of nurses by introducing nurses to patients, informing the patients of the salary asked by the nurse, collecting from the patient the nurse's salary and accounting to the nurse for it after deducting 10 per cent. commission. The appellant county council, in licensing the respondent to carry on the agency under s. 8 (1) of the Nurses Act, 1943, attached the condition, under s. 8 (2), that "the licensee shall not demand or receive from any person any sum in respect of the services of any nurse . . . supplied, which is in excess of the amount appropriate to that nurse . . . calculated in accordance with the" council's "scale of charges . . ." The justices allowed the respondent's appeal, under s. 8 (4), against that condition, and the county council appealed. By s. 8 (2) a county council may in granting a licence to carry on an agency for the supply of nurses impose "such conditions as they may think fit for securing the proper conduct of the agency . . ."

LORD GODDARD, C.J. (SINGLETON and BYRNE, JJ., agreeing), said that the condition, which imposed a limit on the amount of a nurse's remuneration which the agency might receive from a patient, was clearly *ultra vires* because not necessary for securing the proper conduct of the agency within s. 8 (*2*), the object of that subsection being to enable the licensing authority to restrain nursing agencies from charging excessive fees to nurses for introducing them to patients and otherwise imposing undesirable conditions.

APPEARANCES: *Sir Cyril Radcliffe*, K.C., and *Vernon Gattie* (*C. W. Radcliffe*); *John Bussé* (*Reed & Reed*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

NUISANCE: SERVICE OF SUMMONS

R. *v.* Wilson, *ex parte* Battersea Borough Council

Lord Goddard, C.J., Humphreys and Singleton, JJ.
24th October, 1947

Application for an order of mandamus.

The applicant borough council served a nuisance notice on a resident, with which she failed to comply. They therefore took out a summons under the Public Health (London) Act, 1936, for an order calling on her to abate the nuisance. She did not appear, and the magistrate was not satisfied that the summons had been properly served, the only evidence before him on that matter being the endorsement by the warrant officer who had served it stating that he had left it for the resident with a female clerk at the resident's last place of business. There being nothing to show that the defendant resident was the owner or occupier of those premises, the magistrate refused to determine the summons. By s. 301 of the Act of 1936 "any notice . . . or other document" to be served on any person under the Act may be served by delivering it to him at his residence, or to some person on premises of which he is the owner or occupier. The London Government Act, 1939, repeals, *inter alia*, that section so far as it relates to a local authority. By s. 183 of the Act of 1939 "any notice . . . or other document" to be served by or on behalf of a local authority can be served at a person's residence or place of business. The borough council contended that it was s. 183 of the Act of 1939 which was applicable because the summons was a document issued by or on behalf of a local authority, and that the summons had therefore been properly served under that section.

LORD GODDARD, C.J., said that the summons, having been issued by a magistrate as the result of his judicial act in deciding whether the information or complaint before him justified its issue, was not issued on behalf of the local authority, but on behalf of the Crown. That provision was made for the penalty to be paid to the local authority made no difference. Section 183 of the Act of 1939 was, therefore, not, but s. 301 of the Act of 1936 was, applicable. The magistrate was right in refusing to determine the summons as there was no evidence that it had been served at premises of which the resident was owner or occupier.

HUMPHREYS, J., agreeing, said that in his opinion, however, the premises at which service was required under s. 301 of the Act of 1936 were those in respect of which it was proposed to take proceedings.

SINGLETON, J., agreed that the application should be dismissed.

Application dismissed.

APPEARANCES: *Gattie* (*Sharpe, Pritchard & Co.*); *H. L. Parker* (*Treasury Solicitor*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

SMALL TENEMENT: NO WARRANT AGAINST LICENSEE

Ramsbottom *v.* Snelson

Lord Goddard, C.J., Humphreys and Singleton, JJ.

15th January, 1948

Case stated by Stafford Justices.

A farmer, the respondent, engaged the appellant as a stockman at a weekly wage, plus insurance and milk. The employee was provided with a house, free of rent and rates, in which he was required to live for the purposes of his employment. The farmer, having given the employee notice to determine his employment, required the employee to vacate the house, and, on his failure to do so, notified him of his intention to apply for a warrant of ejectment under the Small Tenements Recovery Act, 1838. The employee contended that, as he was a licensee in the house and not a tenant, the justices had no jurisdiction to issue a warrant. The justices held that there was a tenancy, and issued a warrant for possession in twenty-eight days. The employee appealed.

LORD GODDARD, C.J., said that *Dover* v. *Prosser* [1904] 1 K.B. 84 applied. The occupation by the employee was not under a tenancy but by licence. That would be the case wherever there was clearly a service occupancy (such as that of a chauffeur required to live over his garage), which did not, however, mean that justices would never have jurisdiction to issue a warrant where a farmer had a cottage in which he wished an employee to live for convenience. Appeal allowed.

HUMPHREYS and SINGLETON, JJ., agreed.

APPEARANCES: *Colin Duncan* (*Haslewood, Hare & Co.*, for *Wallace-Copland & Co.*, Stafford); *L. A. Blundell* (*Ellis and Fairbairn*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

PROBATE, DIVORCE AND ADMIRALTY

DECREE ABSOLUTE: GUILTY PARTY'S APPLICATION

Woolfenden *v.* Woolfenden

Barnard, J. 31st October, 1947

Motion for annulment of decree absolute.

On 5th May, 1947, the wife was granted a decree *nisi* for desertion. On 24th June the husband's solicitors obtained a certificate from the registry, in accordance with Form 16, that the marriage had been dissolved, no notice of their application being given to the wife, who had delayed applying herself pending settlement of maintenance proceedings. In July the husband went through a ceremony of marriage with another woman. (*Cur. adv. vult.*)

BARNARD, J., said that r. 40 (3) of the Matrimonial Causes Rules, 1947, which regulated applications by guilty parties for decree absolute, had not been complied with, and the time before application by the guilty party prescribed by s. 9 (3) of the Matrimonial Causes Act, 1947, had not elapsed. The making of the decree absolute in those circumstances could not be treated as a mere irregularity in procedure. The certificate of 24th June must be set aside and the decree absolute annulled.

APPEARANCES: *Roland Adams* (*Haslewood, Hare & Co.*, for *Aston, Harwood, San Garde & Green*, Manchester); *R. H. Mais* and *Roger Willis* (*C. H. Simpson & Simpson*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

RECENT LEGISLATION

STATUTORY INSTRUMENTS, 1948

No. 17. **Exchange Control** (Payments) (Union of Soviet Socialist Republics) Order, 1948. January 13.

No. 15. **Treasury Minute** fixing Rates of Interest on Local Loans. January 2.

No. 16. Treasury Minute fixing Rates of Interest on Local Loans (other than Loans to Local Authorities). January 2.

[Any of the above may be obtained from the Publishing Department, S.L.S.S., Ltd., 88/90, Chancery Lane, London, W.C.2.]

Wills and Bequests

Mr. R. A. F. Dauncey, solicitor, of Newport, Mon., left £6,594, with net personalty £6,061.

NOTES AND NEWS

Honours and Appointments

Mr. FRANCIS J. LANIGAN has been appointed State Solicitor for County Carlow, Eire, in place of Mr. Terence Doyle, who has resigned.

The Board of Trade has appointed Mr. WILLIAM FOY CRESSWELL Senior Official Receiver in Bankruptcy attached to the High Court and also Official Receiver for Brighton, in the place of Mr. L. A. West.

Mr. CHARLES S. CAMPBELL, S.C., Sir JOHN L. ESMONDE, Bart., S.C., and Mr. ARTHUR E. CORBETT have been elected Benchers of King's Inns, Dublin.

The following appointments are announced in the Colonial Legal Service: Mr. J. R. GREGG, Attorney-General, Uganda, to be Puisne Judge, Nigeria; Mr. K. R. MACFEE, Deputy Registrar of the High Court, Tanganyika, to be Registrar of the High Court, Tanganyika; Mr. C. J. E. GRUNDY to be Assistant Commissioner of Lands, Gold Coast.

INNER TEMPLE

The Treasurer of the Inner Temple (His Honour E. M. Konstam, K.C.) and the Masters of the Bench entertained the following guests at dinner on 21st January—the Grand Day of Hilary Term: The Cardinal Archbishop of Westminster, the Duke of Wellington, Lord Morton of Henryton, Sir Edward Tindal Atkinson, Sir Harold Scott, Sir Henry Wheeler, Sir Alfred Munnings, P.R.A., Sir Walter R. M. Lamb, Sir James G. Mann, the Provost of King's College, Cambridge, Mr. E. H. Keeling, M.P., the Master of the Temple, Mr. T. M. Pritchard, The Rev. Derek Worlock, the organist of the Temple Church, and the Sub-Treasurer.

OBITUARY

MR. J. R. STOREY

Mr. James Rowland Storey, solicitor, of Messrs. James Storey and Sons, of Sunderland, died on 14th January, aged sixty-seven. He was admitted in 1903, and was a past president of the Sunderland Incorporated Law Society. He was a member of Sunderland Town Council for twenty-five years.

COURT PAPERS

SUPREME COURT OF JUDICATURE

HILARY SITTINGS, 1948

COURT OF APPEAL AND HIGH COURT OF JUSTICE

CHANCERY DIVISION

ROTA OF REGISTRARS IN ATTENDANCE ON GROUP A

Date			Emergency Rota	Appeal Court I	Mr. Justice Vaisey *Business as listed*	Mr. Justice Roxburgh *Witness*
Mon.,	Jan.	26	Mr. Andrews	Mr. Farr	Mr. Blaker	Mr. Farr
Tues.,	,,	27	Jones	Blaker	Andrews	Blaker
Wed.,	,,	28	Reader	Andrews	Jones	Andrews
Thurs.,	,,	29	Hay	Jones	Reader	Jones
Fri.,	,,	30	Farr	Reader	Hay	Reader
Sat.,	,,	31	Blaker	Hay	Farr	Hay

Date			Group A Mr. Justice Wynn Parry *Non-Witness*	Mr. Justice Romer *Witness*	Group B Mr. Justice Jenkins *Non-Witness*	Mr. Justice Harman *Business as listed*
Mon.,	Jan.	26	Mr. Hay	Mr. Andrews	Mr. Jones	Mr. Reader
Tues.,	,,	27	Farr	Jones	Reader	Hay
Wed.,	,,	28	Blaker	Reader	Hay	Farr
Thurs.,	,,	29	Andrews	Hay	Farr	Blaker
Fri.,	,,	30	Jones	Farr	Blaker	Andrews
Sat.,	,,	31	Reader	Blaker	Andrews	Jones

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